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Supreme Court of the United States

October Term, 1970

70-301

NO. ~~70-0161~~

GERRY CHARLOTTE PHELPS,
Petitioner

v.

STATE OF TEXAS,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

Ben G. Levy
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[illegible]

SUBJECT INDEX

	Page
Citations to Opinions Below	1
Jurisdiction	2
Question Presented	2
Constitutional Provision Involved	2
Statement of the Case	2
Reasons for Granting Writ	13
Conclusion	16
Certificate of Service	16
Appendix A (Opinion—Court of Criminal Appeals of Texas)	17

LIST OF AUTHORITIES

CASES	Page
Berger v. U. S., 295 U.S. 78, 55 S.Ct. 629	15
Brown v. State, 266 S.W. 152	13
Frasher v. State, 3 Cr. R. 263	14
O'Connor v. Dallas Cotton Exchange, 153 S.W.2d 266	14
Phelps v. State of Texas, 462 S.W.2d 310	1
Strauss v. State, 173 S.W. 663	13
UNITED STATES CONSTITUTION	
Fourteenth Amendment	2
UNITED STATES STATUTES	
28 U.S.C. §1257(3)	2
VERNON'S ANNOTATED CIVIL STATUTES	
Article 4607	14
TEXAS PENAL CODE	
Article 492	13
Article 493	13

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v.

STATE OF TEXAS,
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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

Gerry Charolette Phelps, Petitioner, prays that a Writ of Certiorari issue to review the judgment of the Court of Criminal Appeals of Texas entered in the above-entitled case on December 16, 1970.

CITATIONS TO OPINIONS BELOW

The judgment of the Court of Criminal Appeals is printed in Appendix A hereto, *infra*, p. 17, and is reported in 462 S.W.2d 310.

JURISDICTION

The judgment of the Criminal Court of Appeals of Texas was entered on December 16, 1970. Petitioner's motion for rehearing was denied by said Court on February 10, 1970. Upon application duly filed therefor, Justice Hugo L. Black of this court ordered on June 4, 1971, that the time for filing this petition for writ of certiorari be extended to and including June 14, 1971. Jurisdiction of this Court is invoked under 28 U.S.C., §1257(3).

QUESTION PRESENTED

(1) Whether the indirect and artful introduction into evidence by the District Attorney, over the timely objection by Petitioner's counsel, that Petitioner, a white female, was then living with "Alex," a black man, was so devastating in effect, as well as irrelevant, as to deprive Petitioner of a fair trial by an impartial jury in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . ."

STATEMENT OF THE CASE

Petitioner, an economics teacher at the University of Houston, was charged with several others with the offense

of robbery by assault, alleged to have occurred on March 22, 1969, in a Houston, Texas, liquor store. Because of intense publicity, a severance was granted Petitioner and the case was transferred to the Criminal District Court Number One in Tarrant County (of which the principal City is Fort Worth) from Harris County (where the principals involved lived and the offense occurred, the principal City of which is Houston). Petitioner was personally prosecuted by the District Attorney of Harris County, Carol Vance, resulting in a jury's verdict of guilty and the jury's sentence of thirty-five years.

The prosecution established that the owner and employees of the Bigwick Liquor Store in Houston were robbed at about 8:30 o'clock p.m. on March 22, 1969, by two young men, later identified as Samuel Clayton Smith and Christopher Allen LaMarre. Prior to the robbery, police officers had alerted the store personnel that a robbery was anticipated and suggested certain measures to make conviction more certain, such as listing serial numbers of the bills, emplacing a radio transmitter within the store, etc. Among those invited to witness the anticipated robbery were the Chief of Police, a Captain in the Sheriff's Office, a City Councilman, and several other high-ranking police officials equipped with walkie-talkie radios. The two robbers took the money, about $1200, and gave it to Petitioner who was parked several blocks from the store. All of the participants in the robbery were apprehended within minutes after its commission, and they were found with the implements and fruits of the crime in their possession. There is, consequently, no question as to the sufficiency of the evidence.

In response to questioning by the District Attorney, the witness LaMarre testified that in some four or five

rehearsals of the robbery, one of the participants was a black man named only "Alex," that he was living with Petitioner, and was about 25 to 30 years old. Petitioner's counsel strenuously objected to such descriptive testimony as irrelevant and highly inflammatory, was overruled, and moved for a mistrial, which was also denied. Since this testimony was profound in its effect upon Petitioner and forms the foundation of this Petition, it is deemed appropriate to quote it at length:

* * *

(Questions by Mr. Vance)

Q. Was Mrs. Phelps present during these rehearsals?
A. Yes.
Q. Was this Renee—do you know if Renee was one of her students or not?
A. Yes.
Q. Did he actually participate in the robbery itself? Renee?
A. No.
Q. Do you know where Renee was living?
A. No.
Q. Now you mentioned another person, a person named Alex, is that correct?
A. Yes.
Q. Do you know what his last name was?
A. No.
Q. Would you describe him, please?

Mr. Gray: We object to this, Your Honor, as his description has no materiality whatsoever to this lawsuit. It will interject prejudicial and inflamatory matters into this cause.

The Court: Overruled.

Mr. Gray: *Note our exception.*

A. (By the witness) *He was black, medium height—*

Mr. Gray: At this time, Your Honor, we again move for a mistrial.

The Court: Overruled.

Mr. Gray: *Note our exception* for the reason that this description is an appeal to prejudice and bias and is interjected for that sole purpose in this lawsuit and has no bearing whatsoever on the issues involved in this case, there being no issues involved in this case, there being no issues as to motive, scheme, system, design, identity or principle. The only purpose is to prejudice this jury against this Defendant and to interject unconstitutionally the issue of color into this case.

The Court: Overruled.

Mr. Vance: Your Honor, I am trying to get him to describe the people. It dosen't matter to us what color they are.

Mr. Gray: We object to any jury speech at this time, Your Honor.

The Court: Overruled.

Mr. Gray: *Note our exception.*

We ask then, Your Honor, that the Court instruct the jury that the fact that the testimony that this mysterious Alex is black is not to be considered by them in any way in determining the guilt or innocence of this Defendant in this cause.

The Court: All right. The jury will not take into consideration the color of anyone in determining the guilt or innocence of the Defendant in the case.

Mr. Gray: And we then renew our objections and move for a mistrial. We feel the instruction is not sufficient to remove the prejudice interjected intentionally and deliberately by the District Attorney in this cause.

The Court: Overruled.

Mr. Gray: *Note our exception.*

By Mr. Vance:

Q. What age person was this person named Alex?

Mr. Gray: We object to this Your Honor. It is not material to any issue in the lawsuit.

The Court: Overruled.

Mr. Gray: *Note our exception.*

A. (By the witness) Twenty-five to thirty.

Q. Do you know where he was living at the time?

Mr. Gray: We object to that, Your Honor. It is not material to any issue in this lawsuit.

The Court: Overruled.

Mr. Gray: *Note our exception.*

A. (By the witness) Her garage apartment.

Mr. Gray: Your Honor, we again move for a mistrial because of the prejudicial and inflamatory nature of this question and this answer that the District Attorney knew in advance what the answer would be and he cannot plead surprise under the circumstances. He knew exactly

and that is what he was seeking again to interject into this lawsuit. We move for a mistrial.

Mr. Vance: I am trying to show the relationship of all these parties as pertained to this robbery whether they participated or did not.

Mr. Gray: May we have the jury removed, Your Honor, if counsel is going to make a jury speech?

The Court: Overruled.

Mr. Gray: *Note our exception.*

By Mr. Vance:

Q. Now did Alex participate in the robbery itself?
A. No.

Mr. Gray: We again then, Your Honor, move for a mistrial since the witness has testified that this man did not participate in the robbery.

The Court: Overruled.

Mr. Gray: There is no conspiracy charge in this indictment.

The Court: Overruled.

Mr. Gray: *Note our exception.*

By Mr. Vance:

Q. Did Alex participate in the rehearsals of the robbery?
A. Yes.
Q. Who all participated in the robbery—I believe you have already told us that. You mentioned this other per-

son, Alex, and you and Bankston and Smith and Mrs. Phelps, is that correct?

A. Yes."

(S.F., pp. 207-215).

Likewise, in response to the District Attorney's questioning, the witness Smith testified that "Alex was staying with Mrs. Phelps at the time." (S.F. 268). For the same reason as before, such testimony is quoted at length:

State's witness Samuel Clayton Smith:

By Mr. Vance:

"Q. All right. Would you tell us about how this shotgun was acquired?

A. I bought it through a fellow I knew. His name is John Smith and he lives out in Bellaire.

Q. How much did the shotgun cost?

A. Forty dollars.

Q. Who furnished the money for that shotgun?

A. Mrs. Phelps.

Q. When was this in relation to the robbery?

A. I believe that was four days prior to the robbery.

Q. Did she give you the forty dollars cash?

A. Yes, it was.

Q. All right. Calling your attention to State's Exhibit No. 5, have you ever seen this sawed off shotgun, twenty gauge shotgun, before?

A. Yes, sir, I have.

Q. Do you know where that shotgun was obtained?

A. I don't remember the exact location but it was in an apartment.

Q. What p of Houston or Harris County was this in?

A. It was in the south side of Houston. It was acquired by Alex or Douglas or whatever you want to call him. It was Alex and I that went to purchase this gun.

Q. How much did that shotgun cost?

A. I am pretty sure it cost fifty dollars.

Q. Was Alex working at the time?

A. No, he was not.

Q. Did she furnish the money for this shotgun?

A. I assume that she did.

Mr. Gray: We object to this, Your Honor, and ask that the jury be instructed to disregard the answer.

The Court: The jury will disregard the last answer.

By Mr. Vance:

Q. Did you ever see Alex with any money he had gotten on his own for working for any employment he may have had?

Mr. Gray: We object to this, Your Honor. It is improper, vague, ambiguous, double barreled and I don't know what all.

The Court: Sustained.

By Mr. Vance:

Q. Did you ever know Alex to work for a living?

A. No, sir, I did not.

Q. Where was Alex living?

Mr. Gray: We object to this, Your Honor.

The Court: Overruled.

Mr. Gray: It is completely immaterial to any issue in this lawsuit and interjects further prejudicial, inflammatory and inadmissible evidence before the jury.

The Court: Overruled.

Mr. Gray: *Note our exception.*

By Mr. Vance:

Q. Do you know where Alex was living?
A. *He was staying with Mrs. Phelps at the time.*

Mr. Gray: We again move for a mistrial, Your Honor, for the reasons stated in all of our previous Motions for Mistrials. This question and answer are so prejudicial it will deny the Defendant a fair trial of the charge before the Court. This evidence is completely and totally immaterial to any issue in this lawsuit, and for all reasons stated in the Motion in Limine.

The Court: Overruled.

Mr. Gray: *Note our exception."*

(S.F., pp. 266-269).

When the State rested, the Defendant made the following motion and informal bill of exception:

"Mr. Gray: Your Honor, I would like to make a motion outside the presence of the jury.

The Court: The jury will go to the juryroom just a minute, please.

> (The following proceedings transpired out of the presence and out of the hearing of the jury:)

The Court: All right, you may proceed.

Mr. Gray: Your Honor, at this time the Defendant renews her motion for mistrial in this case for the reason, first, that the District Attorney of Harris County, Texas, has intentionally and deliberately interjected the inadmissible evidence that the Defendant at the time material to this lawsuit was living with a black man. That had no bearing whatsoever on any issue in this case. The only purpose was to inflame and prejudice the jury against this Defendant and deny her a fair trial to both the issue of guilt and innocence and also on the issue of punishment.

We further renew our motion for mistrial based upon the Court's admission of all the evidence bearing to extraneous offenses including among other things the alleged plan to purchase arms, the trip to the Cuban Embassy and other matters that have no bearing upon any issue in this robbery case before the Court. It is prejudicial, inflammatory and designed to deny this Defendant a fair trial of the robbery charges. It is not material to any issue of motive, scheme, design, identity or principles. The evidence clearly showing that if the Defendant is guilty she is guilty as a principle. It was wholly and completely unnecessary for the State to interject the extraneous offenses into this lawsuit. For that reason we move for a mistrial.

The Court: Overruled.

Mr. Gray: *Note our exception.*

Your Honor, on my Bill of Exception I would like to put Mr. Vance on for a moment, if I might.

The Court: All right. Mr. Vance.

CAROL S. VANCE,

a witness called by the Defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Gray:

Q. You are Carol Vance, the District Attorney of Harris County, Texas?

A. That is correct.

Q. Mr. Vance, let me ask you this; did you or did you not know before you asked the State's witness a question as to the description of the man Alex that he was in fact a Negro?

A. Yes, the same as I knew the races of all the people and approximate ages and the rest.

Q. All right. And when you asked if they knew where the Negro was living did you or did you not know at that time he was living at the time of the offense with the Defendant in the lawsuit?

A. Yes, I did know that he was living there. I didn't know of my own knowledge. I was told that.

Q. You knew that is what the answer would be?

A. Yes, I certainly did.

Mr. Gray: All right, we have nothing further.

We would renew our motion, Your Honor, for mistrial.

The Court: Overruled.

Mr. Gray: *Note our exception."*

(S.F., pp. 312-315).

REASONS FOR GRANTING WRIT

1. The facts of this case present a subtle but important question regarding the oblique use of racial hostility in order to inflame the jury not only to convict but also to impose a crushing sentence upon an accused. It was a jury, not the trial judge, that assessed Petitioner's punishment at thirty-five years imprisonment. Currently, it is almost, but not quite, trite to say that racial prejudice has no place in the administration of justice. Yet, in Texas, the cultural, social, and legal mores have been, and still are, antagonistic to the notion of racial egalitarianism. Article 492, Texas Penal Code, provides as follows:

> "If any white person and nego shall knowingly intermarry with each other in this State, or having so intermarried in or out of the State shall continue to live together as man and wife within this State, they shall be confined in the penitentiary not less than two nor more than five years."

Immediately following this in the Penal Code is Article 493, presuming to define the term "negro":

> "The term "negro" includes a person of mixed blood descended from negro ancestry from the third generation inclusive, though one ancestor of each generation may have been a white person. Any person not included in the foregoing definition is deemed a white person within the meaning of this law."

The Court of Criminal Appeals of Texas has upheld the validity of a Fort Worth city ordinance making it unlawful for a white person and a negro to have sexual intercourse. *Strauss v. State,* 173 S.W. 663. See also *Brown v. State,* 266 S.W. 152, upholding the validity of

a Houston city ordinance forbidding persons of the white and negro races to cohabit with each other. In *Frasher v. State,* 3 Cr.R. 263, the Court of Criminal Appeals held that it has always been the policy of this State to maintain separate marital relations between whites and blacks. As late as 1941, a Texas Civil Appeals Court held, in *O'Connor v. Dallas Cotton Exchange*, 153 S.W.2d 266, at 268:

> "Although we have no Texas case holding that, to falsely charge a white person with being a negro would be slanderous, yet, in view of the social habits, customs, traditions, and prejudices prevalent in this state, in regard to the status of whites and blacks, we think such a charge would be slanderous."

And the civil statutes of this State void marriages between blacks and whites:

> "It shall not be lawful for any person of Caucasian blood or their descendents to intermarry with Africans or the descendents of Africans. If any person shall violate any provision of this article, such marriage shall be null and void."
>
> Art. 4607, Vernon's Ann. Civ. Statutes

Thus, it is not mere rhetoric to say that the District Attorney knowingly demolished the standing of Petitioner before the Texas jury that was to decide her guilt and punishment. And this was done, without belaboring the point, over the strenuous objection of Petitioner's trial counsel, who also vigorously moved for a mistrial based upon such prejudicial—and irrelevant—testimony. *The color of Alex's skin and the place where he lived tended to solve no disputed issue.* The fact that his last name was not known is likewise immaterial. To infer, therefor, that

the only purpose for adducing this immaterial testimony was to prejudice Petitioner before the jury is inescapable.

A reading of the Opinion of the Court of Criminal Appeals will show how coyly it avoided resolving this, the central issue of Petitioner's appeal.

2. In Texas, it is nothing less than heroic to prosecute vigorously what appears to be a criminal conspiracy to rob liquor stores to raise money for the purchase of arms from the Cuban embassy in Canada for possibly seditious purposes in this country. And certainly the prosecuting District Attorney will risk no loss of prestige if the sentence assessed against the principal defendant is quite severe—even if the other defendants are granted probationary sentences (except the one who refused to testify against Petitioner). But perhaps a more significant point is missed, as explained in *Berger v. U. S.*, 295 U.S. 78, 55 S.Ct. 629:

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape nor innocence suffer."

Granted, in Petitioner's case, guilt did not escape—but neither was justice done. And "due process" is concerned not with questions of guilt or innocence, but rather with the *means* by which guilt is ascertained.

CONCLUSION

Because the aforedescribed questioning by the District Attorney was not merely irrelevant but demonstrably ruinous in its impact upon Petitioner, thereby depriving her of substantive due process, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

BEN G. LEVY
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CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of June, 1971, a copy of the foregoing Petition for Writ of Certiorari was served upon counsel for Respondent, the Hon. Crawford C. Martin, Attorney General of Texas, by mailing a copy thereof to him at his address in Austin, Texas, 78711, attention of Howard M. Fender, Assistant Attorney General, through the United States Mail, postage prepaid.

BEN G. LEVY

APPENDIX A

GERRY CHAROLETTE PHELPS, Appellant,

v.

THE STATE OF TEXAS, Appellee.

No. 43568.

Court of Criminal Appeals of Texas.

Dec. 16, 1970.

Rehearing Denied Feb. 10, 1971.

* * *

OPINION

DOUGLAS, Judge.

This is an appeal from a conviction for robbery in Tarrant County after a severance from the coindictees and after a change of venue from Harris County. The punishment was assessed by the jury at thirty-five years.

The record reflects that appellant, a teacher of management at the University of Houston, planned, directed rehearsals, and furnished money and an automobile for the robbery to obtain funds to purchase weapons through the Cuban Embassy in Canada.

She planned the robbery with one of her students, a former student, a seventeen-year-old high school dropout and others. Two of her coindictees robbed the owner and a customer of the Bigwick Liquor Store on Memorial Drive in Houston of more than $1200. The robbers took the money and gave it to the appellant who

was parked several blocks from the store. Officers who had been informed of the planned robbery placed her under arrest shortly thereafter and found the money taken from, and the guns used in, the robbery in her possession.

The sufficiency of the evidence is not challenged.

In the first two grounds of error, it is contended that reversible error was committed when witnesses were permitted to testify about statements and transactions of the conspirators made before the robbery, since no conspiracy was alleged in the indictment, and when it was proved that appellant lived with a Negro man who helped plan and buy guns for the robbery.

Christopher LaMarre, a coindictee who was called by the State, testified that the robbery was rehearsed many times and that a man he knew only by the name of Alex participated in the rehearsals. When LaMarre was asked to describe Alex, appellant's counsel objected that the description would not be material and would interject prejudicial and inflammatory matters into the case. The objection was overruled. The witness answered: "He was black, medium height—." Appellant's counsel interrupted and moved for a mistrial which was overruled.

Mr. Vance, the District Attorney, stated: "Your Honor, I am trying to get him to describe the people. It does not matter to us what color they are."

The court then instructed the jury not to take into consideration the color of anyone in determining the guilt or innocence of the defendant. Another motion for mistrial was overruled.[1]

---

1. The record does not show the race of the co-conspirators of appellant except Alex. It is not definitely clear from the record that the appellant is white.

Assuming that the appellant is white, it was shown by LaMarre that Alex lived in the garage apartment of appellant and later it was shown by the witness Samuel Clayton Smith, another coindictee, that Alex was staying with appellant.

The record does not show that Alex participated in the actual robbery, but it does show he took part in the planning and in the purchase of the weapons to be used in the robbery. He was not indicted with the others and did not testify.

In Saddler v. State, 167 Tex. Cr. R. 309, 320 S.W.2d 146, this Court held:

> "The rule is well settled that the acts and declarations of one conspirator during the furtherance of the conspiracy are admissible against the other conspirators."

The same rule is set out in Aguero v. State, 164 Tex. Cr. R. 265, 298 S.W.2d 822, 826. See Angle v. State, 165 Tex. Cr. R. 305, 306 S.W.2d 718, 723; Parnell v. State, 170 Tex. Cr. R. 30, 339 S.W.2d 49, and Welch v. State, Tex. Cr. App., 219 S.W.2d 804.

[1] Where two or more people take part in the commission of a felony, evidence of the conspiracy is admissible even though the substantive crime of conspiracy is not charged in the indictment.

If the man named Alex had been available, the State could have brought him into the courtroom for identification by the witnesses and the jury could have seen him.

[2] An accused would not be entitled to prevent the State from proving the name of a notorious conspirator.

[3] We hold that the court did not err in permitting the witness to describe one of the conspirators, whose last name was not known by the witness, or in permitting proof of his relationship with the appellant and his part in bringing about the robbery.

In the third and fourth grounds of error, it is contended that it was reversible error to admit evidence that the proceeds of the robbery were to be used to buy guns at the Cuban Embassy in Canada, because the robbery was definitely proved and there was no question of intent.

The State contends that the evidence was admissible to show motive.

In 4 Branch's Ann.P.C.2d, Section 2058, p. 370, is found:

> "Proof of facts which show motive is admissible although it involves proof of an extraneous crime."

In 23 Tex. Jur. 2d, Evidence-Criminal Cases, Section 128, p. 186, it is written:

> "Although the existence of a motive is not essential to a conviction, nevertheless the presence or absence of a motive for a crime is obviously a factor that is related to the question of the defendant's guilt or innocence. Consequently, proof of any existing motive for the offense is generally held admissible, . . ."

In 23 Tex. Jur 2d, Evidence-Criminal Cases, Section 199, p. 309, it is found:

> "Evidence of the commission of other crimes by the accused is admissible to show a possible motive for his commission of the crime with which he is charged."

It should be noted that proof of the financial condition of an accused may be shown in a robbery case, apparently to prove motive. See 5 Branch's Ann. P.C.2d, Section 2590, p. 23.

We hold that the testimony about the statement of the appellant and the other conspirators that the robbery was to get funds to buy arms was admissible to show motive.

[4] Appellant relies on Wiley v. State, 168 Tex. Cr. R. 187, 324 S.W.2d 862, which apparently holds contrary to the rules above set out. To the extent that Wiley is in conflict with this opinion, it is overruled.

The third and fourth grounds of error are overruled.

[5] In the fifth and sixth grounds of error, complaint is made because of the admission into evidence of a hand-written list of weapons titled "Alex List" which was found in appellant's purse when she was arrested, and is as follows:

"ALEX LIST.

"1. M-1 Carbines - 5 With banana clips and extra clips
2. Sub-Machine guns - 3
3. 50-calibre " - 1 SILENCERS
4. 3.57 Magnums " - 3
5. Smith, Weston, Colt, Revolver .38 - 3 IF
6. Colt Model 1917 - Double Action .45 - 3
7. Winchester Model .88 - 2 POSSIBLE!
8. Double Barrell Shotguns - 12 gauge - 3)
9. " " Sawed Off " - 12 gauge - 3) 6
10. Grenades - 50 POWER!!!

"PREFERENCES IF WE CANNOT GET ALL OF THE ABOVE -

5 3

"1st. M-1 Carbines 2nd .38 Specials 3rd 45 Revolver - 3 With scope if possible

4th Any Gernades - 50

5th 3.57 Magnums - 5"

This list was admissible as a part of the proof of the motive for the conspiracy under the authorities previously discussed.

No error is shown. The fifth and sixth grounds of error are overruled.

There being no reversible error, the judgment is affirmed.

MORRISON, Judge (concurring).

Appellant relies upon Wiley v. State, 168 Tex. Cr. R. 187, 324 S.W.2d 862, and states that the purpose for which this robbery was committed is tantamount to the future robberies contemplated in Wiley. I do not agree. The robberies planned in Wiley are clearly recognizable to a Texas jury as offenses against the law. The purchase of arms in Canada is not. Even a lawyer is baffled as to whether or not the purchase of arms in Canada violates any Texas statute.

Supreme Court, U.S.
FILED
OCT 22 1971
E. ROBERT SEAVER, CLERK

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Petitioner

v.

STATE OF TEXAS
Respondent

ON APPLICATION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

BRIEF FOR THE RESPONDENT

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BRIEF FOR THE RESPONDENT

The Respondent State of Texas opposes the granting of certiorari in the instant cause for the reasons set forth below.

QUESTION PRESENTED

The wording used by Petitioner in "Question Presented" in Petitioner's application is misleading, primarily because of the use of the words "indirect and artful" and the words "as well as irrelevant". Therefore, without agreeing that there is really any constitutional question involved in the instant cause, Respondent feels that the inquiry should be restricted to the following question:

"Where a state court rules that testimony concerning the physical description of co-conspirators is admissible, and where such testimony reveals that Petitioner, a white woman and one 'Alex,' a black co-conspirator, were living on the same premises, is such evidence so prejudicial as to deprive Petitioner of a fair trial by an impartial jury in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution?"

Respondent has no particular quarrel with the Statement of the Case set forth by Petitioner except to call to the attention of the Court the fact that there are seven other places in the Statement of Facts at which witnesses were requested to describe and otherwise identify various persons involved in the conspiracy which led to the robbing of the liquor store. At this time it is not considered pertinent to set forth all of such testimony, but this general representation is only necessary so that the Court may understand that the identification of "Alex" is not an isolated instance in the record but rather is in keeping with the remainder of the presentation of the State's case.

Petitioner's application contains (Appendix "A") the Opinion of the Court of Criminal Appeals. Respondent urges that such decision is binding on this Court under the principle expressed in *Erie v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (U.S. Sup.Ct., 1938), unless it be made to appear that such decision is clearly unconstitutional.

An examination of the entire record of the instant cause reveals that the only attempt to inject racism into the trial was the unwarranted effort of defense counsel to make an objection to the Court in the pres-

ence and hearing of the jury for the obvious purpose of creating an error which would detract from an otherwise valid conviction. At no time during the interrogation of witnesses nor at any time during the arguments to the jury did the prosecutor refer or allude to Petitioner's apparent cohabitation with "Alex." Other than defense counsel's objections, there is not even an inference of improper relationship.

If the prosecutor had failed to properly identify the various members of the conspiracy which led to the robbery, which is the ultimate subject of the instant conviction, defense counsel would have vigorously pointed out the various loose ends left by the prosecutor in an effort to place the blame on someone other than his client. The trial court ruled that the evidence was admissible. The Appellate Court approved the rulings of the trial court. Petitioner should not now be allowed to urge upon this court that action affirmatively taken on his behalf be construed in afterthought as an effort on the part of the prosecutor to create a prejudicial situation.

WHEREFORE, PREMISES CONSIDERED, Respondent urges the Court to deny the Petition for Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Brief for the Respondent was served on the attorney for the Petitioner by depositing same in the United States Mail, postage prepaid, certified mail, on this the ____ day of October, 1971, addressed as follows: Mr. Ben G. Levy, Attorney at Law, 2244 W. Holcombe Boulevard, Houston, Texas 77025.

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